BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOHN REYNOLDS Claimant	)	
VS.	)	
COUNTRY MART #2616 Respondent	)	Docket No. 1,031,418
AND	)	
BENCHMARK INSURANCE CO. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the February 4, 2008, Award entered by Administrative Law Judge Thomas Klein. The Board heard oral argument on May 21, 2008. William L. Phalen, of Pittsburg, Kansas, appeared for claimant. Douglas C. Hobbs, of Wichita, Kansas, appeared for respondent and its insurance carrier.

The Administrative Law Judge (ALJ) found that claimant had a 15 percent permanent partial impairment to the body as a whole. The ALJ also found, however, that claimant was terminated from his employment with respondent for good cause, unrelated to his work injury or restrictions. Therefore, the ALJ found that claimant was not entitled to a work disability.

The Board has considered the record and adopted the stipulations listed in the Award, except for stipulation number 10. The ALJ states: "Claimant's average weekly wage on the date of accident is unknown at this time."[1] However, the parties filed a stipulation on July 30, 2007, which states that claimant's average weekly wage is $173.26 and his weekly compensation rate is $115.51. The ALJ used the correct compensation rate in his award. In addition, during oral argument to the Board, the parties agreed that claimant's percentage of functional impairment is 15 percent.

[1] ALJ Award (Feb. 4, 2008) at 2.

ISSUES

Claimant contends that claimant made a good faith effort to retain his employment but was terminated without cause by respondent. Claimant argues he is currently unemployed and is not able to work because of his limitations, his disabilities, and the pain he is experiencing. Accordingly, claimant requests the Board reverse the ALJ's denial of a work disability and find that claimant is permanently and totally disabled. In the alternative, if the Board finds claimant is not permanently and totally disabled, he requests that the Board find he has sustained a task loss of 36 percent and a wage loss of 100 percent for a 68 percent work disability.

Respondent requests that the Board affirm the finding of the ALJ that claimant was terminated for good cause, unrelated to his work injury. Accordingly, the respondent requests the Board also affirm the ALJ's finding that claimant is limited to an award based upon a 15 percent permanent partial impairment to the body as a whole.

The issues for the Board's review are: Was claimant terminated from his employment with respondent for good cause unrelated to his accident and injuries? If so, is claimant precluded from receiving a permanent partial disability award in excess of his percentage of functional impairment? If claimant is not precluded from receiving an award in excess of his percentage of functional impairment, then what is the nature and extent of claimant's disability?

FINDINGS OF FACT

Claimant worked for respondent, a grocery store, as a deli worker. He was responsible for slicing the meat and cheese products. He also had to clean, mop, put mats down, stock products, and do inventory. He was not a full time employee but worked 20 hours or less per week and earned $6 per hour. Three weeks before his injury, claimant was found eligible for social security disability because he is bipolar. He intended to work at respondent and also remain eligible to receive social security disability benefits.

On June 6, 2006, claimant injured his back while unloading floor mats from a shopping cart. He was seen at the emergency room. A week later, he followed up at the Parsons Clinic. Claimant continued to work but performed light duties such as packaging sliced meat and working the cash register. He was told not to do the cleaning duties. Claimant was eventually seen by Dr. Paul Stein, who put him on prescription painkillers and took him off work effective July 19, 2006. Dr. Stein released him to return to work with restrictions on August 16, 2006. However, before he was released to return to work, he was terminated because of an incident that occurred at the store. His last day worked would be sometime prior to July 19, 2006, when he was taken off work by Dr. Stein.

Claimant testified that on August 15, 2006, he went into the store to use the courtesy phone because he had no phone at home. He thinks he was using the phone to

call Dr. Stein, and then he called his wife. He said that as he was speaking on the phone with his wife, a coworker, Jane Kite, tried to take the phone out of his hand. He asked Ms. Kite what she thought she was doing, and she started screaming at him and said she was calling the police. Claimant said he just dropped the phone to the floor and walked out of the store. He was not at the store when the police arrived, and the police did not go to his home.

Mary Jane Kite is the front end supervisor at respondent and is in charge of the courtesy booth and the checkers. She testified that on August 15, 2006, she was working the courtesy booth and claimant was using the courtesy phone. Claimant was not working on that day, nor was he wearing anything that indicated that he worked for respondent. A young lady came up to the courtesy booth, and Ms. Kite started to cash a check for her. While she was doing so, claimant started cursing at the customer and telling her he was going to kill her in the parking lot. He was yelling that the customer owed him money. Ms. Kite turned to him, put her finger to her lips, and shushed him. Ms. Kite said that claimant continued to threaten and curse at the customer, and Ms. Kite told him to hang up the phone. Claimant got louder and more belligerent, and she walked over and put her finger on the phone button to cut him off. When she did this, claimant threw the phone at her and cursed at her. She then told a coworker to call the police, and claimant left the building. Ms. Kite was not hit by the phone when claimant threw it, but it came within about five or six inches of her.

Gabriel Fernandez no longer works for respondent. But on August 15, 2006, he worked as assistant manager at respondent. Mr. Fernandez testified that on that day, he was at the courtesy counter cashing a check for a female customer and claimant was on the courtesy phone. He thinks the customer and claimant knew each other. The customer did not say anything. Claimant said, "you will never guess who just walked in here."[2] Mr. Fernandez assumed it was the customer he was helping. Then claimant said, "this bitch owes me money. I'm going to get my money."[3] Mr. Fernandez told him to watch his mouth. Claimant continued to go on, and Ms. Kite told him to get off the phone. Claimant then hung up the phone and walked away towards the deli department. Mr. Fernandez finished with the customer and walked towards the deli department to talk to claimant. By the time he got there, claimant was gone.

Mr. Fernandez next heard a commotion at the front of the store. He walked forward and saw claimant walking around the front and out the door. Ms. Kite was red-faced, like she was going to cry. Another employee, Teresa Cannon, said she could not believe claimant had done that. Then Ms. Kite and Ms. Cannon told Mr. Fernandez that claimant had thrown the phone at Ms. Kite. Ms. Kite told him she had taken the phone to hang it

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[2] Fernandez Depo. at 8.

[3] *Id.* at 9.

up and claimant grabbed the entire phone and flung it towards her. After Mr. Hernandez heard that story, he went out the door of the store to try to find claimant, but he was gone. When Mr. Fernandez came back into the store from the parking lot, he called the police. He told the police that claimant was not welcome on the store property. Mr. Fernandez never heard claimant threaten to kill a customer.

Claimant denied that he used profanity toward a customer or Ms. Kite, threatened a customer, or threw a phone at Ms. Kite. He admitted that on August 15 Mr. Fernandez told him to "cool down," but said he did not know why Mr. Fernandez said that. He said Mr. Fernandez also told him not to return to the store.

Claimant had not been reprimanded at work before this incident. He had not been accused of using profanity, screaming at people, or not getting along with his coworkers or customers. Claimant said that when he started work at respondent, he told them about his bipolar condition. However, none of respondent's employees who testified knew about his bipolar condition, although one coworker, Carol Sharp, said she could tell he had something wrong with him.

Mr. Fernandez wrote a note to Kent Brumbaugh, the store manager, and Dan Gilreath about what happened. The note was signed by Ms. Kite and Ms. Cannon, as well as one of the police officers who responded to the call. Mr. Fernandez also filled out an employee reprimand on August 17, 2006. That reprimand stated that claimant had come in the store and started to curse at a customer, that claimant came back and started cursing again, that Ms. Kite tried to hang up the phone, and that claimant threw the phone at her. The reprimand went on to say that claimant had been fired August 17, 2006, although Mr. Fernandez said he did not fire claimant as that would have to have been approved by Mr. Brumbaugh.

Ms. Kite said that if an employee is written up three times, they are terminated, unless an employee is caught stealing or being rude to customers. In that case, an employee is immediately terminated. Ms. Sharp, the current store manager, said that depending on the offense, normally if an employee is written up three times, he or she is terminated. It would not matter if claimant was on or off the clock at the time of the incident. Employees represent the store whether or not they are clocked in.

Matt Good is the treasurer and part owner of Bob's Super Saver, Inc., who owns respondent. He is aware of an incident that occurred in respondent's store on August 15, 2006. He said claimant was terminated because he used improper language and threw a phone at a coworker. He believed that Mr. Fernandez made the initial decision to terminate claimant and that Kent Brumbaugh, the store manager, concurred. Furthermore, all of the store owners agreed with that decision. Mr. Good did not think a written termination notice was sent to claimant, but the store manager was supposed to tell him verbally. No one in ownership attempted to contact claimant and get his side of the story. Mr. Good did not know that claimant was bipolar.

Mr. Good testified that with claimant's restrictions of no lifting more than 20 pounds on any single lift up to twice a day, 10 pounds occasional lift, no frequent lifting, no overhead lifting, and no bending or twisting of the neck, respondent would have been able to accommodate him if he had not been terminated. There are other employees who work for respondent that had injuries and were allowed to return to work with restrictions. Mr. Good said that claimant could clean glass and mirrors and sweep floors. He could spend 20 to 35 hours a week with tasks that fall within his job restrictions. Respondent does not have a written policy that says it will provide accommodated work for workers. Claimant did not work after July 1, 2006.

Carol Sharp has worked for respondent for 14 years. During that period of time she has had two workers compensation claims. She had rotator cuff surgery and back surgery. She was allowed to come back to work at respondent after both surgeries. Respondent worked with her to find work for her within her restrictions.

Claimant believes he was terminated from respondent because he had gotten injured and respondent did not want him to work there anymore. At his deposition taken February 14, 2007, he said he had been looking for a job since August 16, 2006. He looked through the newspaper and had been working with Kansas Rehabilitation Services to find a job. He had not personally gone and applied any place but has called contact numbers listed in the newspaper. He contacted four or five places and told them about his restrictions but could not recall which businesses he contacted. He has an up-to-date resume but has not given it to any prospective employers. A couple of the businesses he contacted told him that he was pretty much unemployable. At the regular hearing held May 1, 2007, he said he had not looked for a job since his deposition because of his limitations and his pain, although he continues to meet with someone from Kansas Rehabilitation Services every couple of weeks. He would be afraid to work anywhere because he might hurt himself more. He cannot sleep through the night and wakes up six to eight times a night because of the pain, which causes him to be tired constantly. He lies down three or four times a day for two hours at a time. He did not think he could work at respondent even if they offered him a job because he would have to bend and stoop and lift more than his weight limitations, and it would cause him too much pain.

Dr. Brett Donahey initially treated claimant on June 14, 2006, for injuries he received in a work-related accident at respondent. Claimant complained of right neck pain with radiculopathy. An x-ray was taken of claimant's cervical spine. Dr. Donahey did not see any changes in his disc heights, nor were there any fractures. He told claimant to use over-the-counter pain medication. Dr. Donahey also ordered an MRI and placed restrictions on claimant of no lifting over 10 pounds and no pushing or pulling over 10 pounds.

The MRI report revealed that claimant had a diffuse disc bulge at C5-6. The spinal cord itself was not being impinged upon. There was a smaller disc protrusion at C6-7. Dr. Donahey said that the changes shown on the MRI were mild but claimant was having

severe symptoms. Those symptoms were out of line with what Dr. Donahey clinically saw on the MRI. Dr. Donahey prescribed muscle relaxants and pain medication. He gave claimant new temporary restrictions of no lifting over five pounds, no push-pull over five pounds, and no reaching above shoulder level.

Dr. Paul Stein, a board certified neurological surgeon, treated claimant at the request of respondent for neck and upper extremity symptomatology. He first saw claimant on July 19, 2006. Claimant complained of numbness and tingling in both arms but only into the right hand. He reviewed an MRI scan of claimant's cervical spine taken June 22, 2006, which showed that he had degenerative disk disease with disk bulging at C5-6 extending into both foramina, right greater than left. He found similar findings to a lesser degree present at C6-7. Dr. Stein recommended that claimant have physical therapy and epidural steroid injections. He also gave claimant a prescription for pain medication. Claimant was already off work, and Dr. Stein kept him off work. The epidural steroid injections were performed by Dr. Landers.

Dr. Stein next saw claimant on August 16, 2006. Claimant reported to him that the first epidural steroid injection he had was helpful for a period of time but the second was a bad experience. Claimant did not want any more injections, and Dr. Landers did not recommend further injections. Dr. Stein sent claimant to more physical therapy with a specific order for cervical traction. Dr. Stein also indicated that claimant could return to work with restrictions if there was work available.

Dr. Stein saw claimant only one other time, September 20, 2006. He did not conduct an examination of claimant on that date but only visited with him. Claimant told him that he continued to have significant pain and continued to need the pain medication. However, he said he thought his neck mobility was a little better with physical therapy. Dr. Stein told claimant that his only other option was surgery, which claimant declined.

Based on the AMA *Guides*,[4] Dr. Stein believed that claimant was in the diagnosis related cervicothoracic Category III, which carries a 15 percent whole person impairment. Dr. Stein gave claimant permanent restrictions that he could lift no more than 20 pounds in a single lift but could occasionally lift 10 pounds and frequently lift five pounds. Claimant should do no repetitive bending and twisting of the neck and should do no overhead lifting. Dr. Stein reviewed a task list prepared by Steve Benjamin. Of the 58 nonduplicative tasks on the list, Dr. Stein opined that claimant was unable to perform 21 for a 36.2 percent task loss.

Dr. Edward Prostic, a board certified orthopedic surgeon, examined claimant on November 17, 2006, at the request of claimant's attorney. Claimant gave Dr. Prostic a

[4] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

history of his accident and denied previous problems with his neck or any other area of preexisting musculoskeletal impairment. He complained of pain with his neck with radiation into his right arm with numbness and tingling. Dr. Prostic believed that those complaints of pain are consistent with the mechanism of injury given by claimant.

Dr. Prostic reviewed the MRI taken of claimant. The MRI showed evidence of disk protrusion greater at C6-7 than C5-6. The C6-7 lesion was asymmetric to the right. Dr. Prostic diagnosed claimant with a right C7 radiculopathy from herniation of the disk at C6-7. He opined that although claimant might be improved by surgery, because he is bipolar he is less than an ideal candidate. People with significant problems with depression respond less well to spinal surgery, and some of them have a continuation of the radicular symptoms even if the lesion causing the radiculopathy is cured.

Dr. Prostic believed that claimant's work-related accident caused or permanently aggravated the condition in his neck. Dr. Prostic placed restrictions on claimant. He said claimant was capable of only light-medium level employment with avoidance of activities with his head away from neutral and use of vibrating equipment. He further restricted claimant to occasional lifting of 25 pounds and frequent lifting of 10 pounds. Dr. Prostic reviewed a task list prepared by Karen Terrill. Of the 41 nonduplicative tasks on that list, Dr. Prostic opined claimant is unable to perform 15, for a task loss of 36 percent.

Based on the AMA *Guides*, Dr. Prostic rated claimant as having a 15 percent permanent partial impairment of the body as a whole.

Dr. Prostic opined that claimant is essentially permanently and totally disabled from gainful employment, based upon his work background, his bipolar condition, his work-related injuries, and his physical restrictions. However, if he took claimant's bipolar condition out of the equation, claimant could work within the restrictions Dr. Prostic provided. Dr. Prostic had no information concerning whether claimant's bipolar condition was controlled by medication. He said that people who are depressed and have spinal problems often are overly hypocondriachal and hysterical. They often get upset every time they feel an ache or pain. Once a psychologist or psychiatrist can control the depression, they become better orthopedic patients. Dr. Prostic believed that if claimant's bipolar condition is well controlled, there is no reason he cannot hold a job within his physical restrictions.

Karen Terrill, a vocational rehabilitation consultant, conferred with claimant by telephone on January 29, 2007, at the request of claimant's attorney. Together, they compiled a list of 41 nonduplicative tasks that claimant had performed in the 15-year period before his accident.

At her deposition, Ms. Terrill opined that considering claimant's restrictions, educational background, work background, transferable job skills, and psychological condition, he has no capacity to work in the open labor market. But nowhere in the report

she prepared does it say that claimant is incapable of substantial and gainful employment. Ms. Terrill did not provide an opinion regarding claimant's ability to earn a comparable wage. Claimant was not working at the time of the interview and had a 100 percent wage loss.

Steve Benjamin, a rehabilitation consultant, interviewed claimant by telephone on April 9, 2007, at the request of respondent. He compiled a list of 58 nonduplicative tasks that claimant performed in the 15 years before his injury at respondent.

Claimant told Mr. Benjamin that the last grade he completed was 11th but that he completed a GED in 2000. Claimant also completed and was certified as a nurses' aide in 2000. Claimant completed one semester at Labette County Community College in music recording. Mr. Benjamin opined that claimant would be able to earn $321.10 per week working a 40-hour week. He believed that claimant could perform entry-level jobs as a cashier, a home attendant, a hotel clerk and a sales clerk. The $321.10 is an average of the potential earnings in those positions.

PRINCIPLES OF LAW

K.S.A. 44-510c(2) states:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

K.S.A. 44-510e(a) states in part:

> If the employer and the employee are unable to agree upon the amount of compensation to be paid in the case of injury not covered by the schedule in K.S.A. 44-510d and amendments thereto, the amount of compensation shall be settled according to the provisions of the workers compensation act as in other cases of disagreement, except that in case of temporary or permanent partial general disability not covered by such schedule, the employee shall receive weekly compensation as determined in this subsection during such period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks. . . . . Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the

ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

In *Ramirez*,[5] the Kansas Court of Appeals stated:

> K.S.A. 44-510e(a) precludes permanent partial disability compensation in excess of the functional impairment as long as the worker earns 90% of his or her pre-injury wage. [Citation omitted.] However, an employee may still be entitled to permanent partial disability benefits if the employer conducts an economic layoff or the employee's accommodated position is no longer available. [Citation omitted.]
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> Kansas courts have found that under certain circumstances, a worker is precluded from obtaining permanent partial disability compensation. In *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991), Perez argued that his work-related injuries prevented him from engaging in any type of employment following his termination from IBP for absenteeism. The ALJ, the director of workers compensation, and the trial court all found that Perez had failed to show a work disability. On appeal, this court recognized that "K.S.A. 1990 Supp. 44-510e(a) creates a presumption that no work disability exists under circumstances where the worker returns to the same work, for the same wage, after an injury" 16 Kan. App. 2d at 279. This court noted the evidence revealed that Perez returned to work almost immediately after his injury, worked 33 out of 57 days, and was ultimately terminated for absenteeism. This court concluded by affirming the award limiting Perez to his demonstrated functional impairment. 16 Kan. App. 2d at 279.

In *Niesz*,[6] the court stated:

> [Ed] Lee testified that Bill's never investigated the complaints against Niesz and did not discuss the complaints with other Bill's employees. The instant case is

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[5] *Ramirez v. Excel Corp.*, 26 Kan. App. 2d 139, 142, 979 P.2d 1261, *rev. denied* 267 Kan. 889 (1999).

[6] *Niez v. Bill's Dollar Stores*, 26 Kan. App. 2d 737, 740-41, 993 P.2d 1246 (1999).

> distinguishable from *Ramirez v. Excel Corp.*, 26 Kan. App. 2d 139, 979 P.2d 1261, *rev. denied* 267 Kan. 889 (1999). In *Ramirez*, the claimant was terminated for failure to disclose a prior workers compensation claim on his employment application. Here, Niesz was terminated because customers had complained; however, there was no investigation into the validity of the complaints.
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> Bill's reliance on *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), is misplaced. The claimant in that case refused accommodated work that was within her restrictions. [Citation omitted.] The record in this case shows that Niesz accepted accommodations and continued to work until her position was terminated. Thus, *Foulk* does not apply.
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> The Board correctly interpreted K.S.A. 1998 Supp 44-510e(a). The presumption of no work disability is subject to reevaluation if a worker in an accommodated position subsequently becomes unemployed. The Board noted that Niesz did not display any bad faith, but instead demonstrated a strong work ethic. The Board correctly interpreted the law, and its decision will not be overturned on appeal.

In *Gasswint*,[7] the Kansas Court of Appeals stated:

> Under the facts and circumstances of this workers compensation case, the Board did not err in concluding that a worker could not recover for work disability when the employer had attempted to place the worker in an accommodated position and the worker's loss of employment resulted solely from the worker's own misconduct.

ANALYSIS

Claimant has failed to prove that he is permanently and totally disabled from engaging in gainful employment. Furthermore, because claimant was terminated for cause from a job that would have been accommodated to meet his restrictions, the wage claimant would have earned at that job will be imputed to him. As such, claimant "is engaging" in work that pays at least 90 percent of his preinjury average weekly wage and the presumption of no work disability in K.S.A. 44-510e(a) applies. Therefore, permanent partial disability compensation is limited to the percentage of functional impairment.

The Board finds the testimony of Mr. Fernandez, Ms. Kite, and Ms. Sharp to be more credible and reliable than claimant's testimony about the events of August 15, 2006, that led to claimant's termination. Claimant was terminated for being rude to a customer, using profanity, and assaulting a coworker. Claimant was in the store and, even though he was not working at the time, his termination was for cause and was an exception to the

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[7] *Gasswint v. Superior Industries International-Kansas, Inc.*, __ Kan. App. 2d __, Syl. ¶ 3, __ P.3d __ (No. 97,518 filed Feb. 8, 2008)

progressive discipline policy that would have otherwise entitled claimant to a written warning. Although the store manager did not contact claimant to get his side of the story, this was not necessary under the circumstances where the assistant manager was present during some of the incident and immediately spoke with witnesses to the rest. This was not a situation like in *Niesz*, where the respondent took the word of a single customer and failed to speak to the claimant, and where claimant's actions were not intentionally contrary to respondent's policies. Instead, this case falls within the rule announced in *Ramirez,* where a termination for cause can result in a denial of disability compensation above the percentage of functional impairment. But for claimant's actions and resulting termination, respondent would have retained claimant in its employment, accommodated his restrictions, and paid him a comparable wage.

CONCLUSION

Claimant's permanent partial disability award is limited to his percentage of functional impairment.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated February 4, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June, 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge